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January 27, 1993


Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street
Washington, D.C. 20554

Re: Rule Making Comments
MM Docket No. 92-266

Dear Ms. Searcy:

Transmitted on behalf of The City of Miami Beach, Florida, please find an original plus nine copies of its Comments in the Cable Television Rule Making presently before the Federal Communications Commission in MM Docket No. 92-266.

Sincerely yours,


Matthew L. Leibowitz
Counsel for
The City of Miami Beach, Florida

MLL/mdr

Enclosures

P. 03

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JAN 27 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Implementation of Section 8 of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

[illegible]

MM Docket No. 92-266

COMMENTS

Respectfully Submitted,

Matthew L. Leibowitz
Counsel for
The City of Miami Beach, Florida

January 27, 1993

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SUMMARY

The City of Miami Beach, Florida, in its Comments supports the Commission's efforts in establishing appropriate rate regulation and furtherance of the Cable Television Consumer Protection and Competition Act of 1992 ("Act").

The City believes that it is the intent of Congress to produce rates lower than those in effect when the Act was enacted through the establishment of a reasonable rate standard for basic cable service and an unreasonable standard for cable programming services. We believe that wherever possible, all rates for programming and equipment should be unbundled.

With respect to effective competition, the City believes that the Commission must consider wireless cable operators service to its protected service area and factor in competition on an individual competitor basis, not on a cumulative basis.

With respect to the basic cable service regulation itself, the City believes that no distinction should be drawn between local television stations whether or not they choose must-carry or retransmission consent.

We believe the Act empowers the local franchise authorities with sufficient jurisdiction to regulate rates and that the Act preempts any state or local laws or ordinances which would prohibit or impair a local franchise from regulating cable rates consistent with the Act and the FCC implementation rules and regulations.

With respect to local franchise certification, the Commission must take great care with respect to the draconian issue of

revocation and in place thereof, seek alternative regulatory responses to violations by local franchise authorities.

We believe that the Act sufficiently provides for implementation and enforcement by the newly certified local franchise authority.

Generally speaking, we believe that the Commission has provided insufficient time frames for the local franchise authority and the public to participate in the rate regulation process.

Of critical import, the City takes great exception to the Commission's consideration of treating cable programming service complaints as informal adjudications and not restricted proceedings. We believe that this dramatically favors cable operators who are well represented in Washington, D.C. and thus, greatly disfavors complainants or local franchise authorities. Under no circumstances should the Commission allow for ex parte contacts by any party with respect to rate regulation and complaints.

Regulation of Cable Services Rates

1. The City of Miami Beach, Florida, through undersigned counsel, hereby submits its comments in the Federal Communications Commission's Rulemaking in the matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 ("Act") concerning Rate Regulation.

2. At paragraph 4 the Commission raises the issue of whether the Act reflects a Congressional intent to produce rates generally lower than those in effect when the Act was enacted. In this regard it is both interesting and important to note that the Act is silent as to whether the rate regulation encompassed therein should be retroactive or prospective. Rather, Congress chose to establish a standard that basic cable service rates should be "reasonable" and that rates for cable programming services should "not be unreasonable". Accordingly, we believe that the FCC should establish rates or formulas to correlate to these standards. If any rate reductions are required to comply with these new standards, the Commission's rules should require cable operators to reduce their rates within 30 days of the effective date of the rules.

3. In this context, the Commission should recognize that since the enactment of the Act many cable operators around the country have instituted rate increases to evade the prospective rate regulation. In these instances, not only do we believe that the Commission should require a roll back of rates, but we believe

that the Commission should mandate refunds, with interest, to avoid the unjust enrichment of the cable operators.¹

4. In paragraph 5, the Commission inquires into the packaging of programming by cable operators. We believe that wherever possible the FCC should foster unbundled programming and equipment choices. Where bundling is required due to equipment limitations, financial and regulatory incentives must be found for cable operators to replace antiquated equipment with equipment that will allow for unbundled choices.²

Standards and Procedures for Identifying Cable Systems Subject to Rate Regulation for Provision of Cable Services

5. The Commission seeks guidance with respect to the statutory definition of effective competition. With respect to the concept of whether households are "offered" video programming under second and third tests, we believe that the cable operator's "offering" must be viewed in terms of homes passed, while a wireless cable operator must be viewed from the prospective of service in its protected service area. With respect to whether a multichannel video programming distributor provides compatible video programming, a true competitor should offer not only local

¹ Attached hereto please find a letter dated December 14, 1992 from the City of Miami Beach to Gold Coast Cablevision with respect to such an attempted increase.

² For instance, this could be accomplished through limitations on profit allowed in any rate regulation analysis for antiquated equipment.

television programming without consideration to multiplex channels, but also offer a similar number of non-local television services including super stations, pay channels, and other special offerings such as pay-per-view.

6. The Commission has tentatively concluded that it should calculate market penetration for purposes of its second test of effective competition on a cumulative basis, thus adding the subscribers of all alternate multi-channel video program distributors other than the largest together. While we view it unlikely that there will be several multi-channel video programming distributors serving the same area in the near future, it is possible given new technology that additional multi-channel video programming distributors will develop. However, from the issue of market penetration, we believe that the cumulative analysis defeats the intent of Congress. Specifically, Congress established a very low threshold of only 15% which clearly does not represent a true competitive presence in a given marketplace. Thus, we believe it is appropriate that an individual competitor achieve at least a 15% of the household in a franchise area prior to the determination that there is effective competition.

Basic Cable Service Regulation

7. The Commission raises the question in paragraph 11 as to whether local television stations should be treated differently in the event that they elect must carry as opposed to retransmission consent. We believe any distinction would defeat the purpose of

the concept of the basic tier. We believe that Congress intended the basic tier to include all local television stations, whether or not they choose must carry or retransmission consent.

8. At paragraph 12 the Commission inquires as to whether the Congress intended to establish a basic buy-through requirement which would preclude the offering of video services completely "a la carte" without prior subscription to the basic service tier. We believe that the plain language of the statute prohibits a cable operator offering customer cable services including but not limited to premium channels or leased access channels on a stand alone basis. Rather, Congress clearly intended that the basic tier be the prerequisite for a cable subscriber to receive any additional service.

Regulation of the Basic Service Tier By Local Franchise Authorities
and The Commission

9. The Commission tentatively concludes that it has the power to regulate basic cable television service rates only if the Commission has disallowed or revoked the franchise authority certification. Thus, unless a local franchise authority seeks to assert regulatory jurisdiction over basic service, it would have no independent authority to initiate regulation of basic service rates. We believe this interpretation runs afoul of the clear congressional intent to regulate rates for the basic tier. While Congress clearly expressed a strong intention and desire for rates to be regulated on a local level, in the event that local rate

regulation is not possible (for instance, a lack of resources by local franchise authorities), then by default the FCC must accept rate regulation. Any other result would be contrary to the clear Congressional intent to require local cable operators to be subject to rate regulation to determine whether rates for their basic service tier are reasonable. Therefore, in the event that a local franchise authority fails to apply for certification, we believe the appropriate implementation of rate regulation requires that the FCC review the cable operator's rates so as to avoid a default of Congressional intent.

Finding of Effective Competition

10. The Commission proposes to base its findings that effective competition does not exist initially on the determination by the local franchise authority. Thus, it proposes to have the local franchise authorities to submit findings and its basis for its conclusion about the absence of effective competition as part of a certification process. We support this position. However, we submit that in some instances relevant data may not be available to local franchise authorities. For instance, if service in a local franchise area is provided by wireless cable operators or in the future by a DBS operator (assuming DBS service is included in the definition of effective competition), these operators are not required to provide data to local franchise authorities or to the FCC setting forth how many subscribers it has and a breakdown by

geographic locations conforming to franchising areas.³ Thus, local franchise authorities must be able to certify that effective competition does not exist based upon the best of their knowledge.

11. In the event that the cable operator believes that the certification by the local franchising authority regarding the lack of effective competition is in error, it should be required to notify the local franchise authority and the FCC within seven days of the local franchise authority's submission to the FCC and should be required to include specific information and data supporting its opposition.

Filing of Franchise Authority Certification

12. The Commission seeks guidance concerning the jurisdiction of local franchising authorities to regulate rates pursuant to the Act. Historically, many local franchise authorities regulated cable rates pursuant to state and local law. However, with the enactment of the 1984 Cable Act, such rate regulations were prohibited. Therefore, franchises issued or renewed since 1984 either deleted any rate regulation by local authorities, or did not include them in the first instance. Accordingly, to implement the Act, not only does the Commission have to concern itself with local laws, such as the local enabling cable franchise ordinances, but also the actual franchise agreements themselves.

³ The FCC may want to consider requiring submission of such information to the FCC and/or to the local franchise authorities in the future.

13. We believe that the Act preempts any state or local laws that would prohibit or impair a local franchise authority from regulating cable rates consistent with the Act and the FCC rules and regulations. Further, it is clear that the Act preempts any pre-existing franchise agreement in the area of rate regulation.

Revocation of Certification

14. The FCC requests comment on the procedures for revocation of certification and alternative sanctions for local franchise authorities who are found to be operating in violation of the Act or the FCC rules and regulations.

15. Revocation of a local franchise authority to regulate rates of its local cable operator is a draconian sanction, potentially leading to an absence of rate regulation notwithstanding the lack of effective competition. Thus, we believe that remedies short of revocation must be provided for in all instances other than misrepresentation or repeated serious willful violations of the Act or Commission's rules and only after a local franchise authority has been put on notice by the FCC that specific actions were improper and not cured by the local franchise authority within a reasonable period.

16. With respect to the revocation procedures, the FCC sets forth proposed response times. The FCC must recognize that in many cases local franchise authorities do not have the procedures in place or the personnel to respond to such matters in very brief periods. Thus, we believe that in the event a cable operator files

a petition for revocation or other relief against a local franchise authority, that at least 30 days be provided for opposition pleadings. In this same regard, in the event a cable operator petitions a local franchise authority for a change of regulatory status due to a change in the marketplace such that effective competition may exist, the public must be given no less than 60 days to comment or oppose such a request since most local franchise authorities lack resources to disseminate information or are unable to seek public comment in shorter time periods.

Regulations of Rates for Equipment

17. We concur with the Commission's tentative conclusion that the Act requires cable companies to base their rates for equipment and installation on "actual costs" and that such costs should not be bundled with rates for the lease of any equipment. However, we note that in paragraph 66, the Commission does appear willing to provide for a reasonable profit on this equipment covered by Section 623(b)(3) while the statute limits the Commission to only "actual costs."

18. Moreover, we agree with the Commission's tentative conclusion that cable operators should be mandated to apply only an actual cost analysis to the installation of equipment in order to calculate the rates for installation of connections for additional receivers. The FCC also correctly concludes that if additional connections are installed at the same time as the subscriber's initial service is installed that the cost be limited

to recovering only the incremental cost of the additional installation. In this context we would note that the Commission recognizes that it is likely customers will make changes in their cable service as a result of retiering. Thus, we would respectfully suggest that if additional connections are made during this process, that operators again be limited to recovering only incremental costs for the additional installation.

Implementation and Enforcement

19. With respect to the initial review of a cable operator's proposed basic tier, the FCC is in error to require expeditious review by the newly certified local franchise authority. While cable operators have the resources and experience in rate regulation, many local franchising authorities do not have such experience. Thus, although the local franchise authorities may have the appropriate personnel and procedures in place, it is likely to be the first time for many local franchise authorities to consider local cable television rates. Thus, it is only reasonable to assume that the process will take longer and be more cumbersome. Furthermore, given the fact that the Act requires the local authority to provide for a reasonable opportunity for consideration of views of interested parties, i.e., cable consumers, it is likely that many, if not all local authorities, will be required to hold at least one if not more public meetings. Such public meetings require advanced scheduling and advanced

public notice.⁴ Further, similar to the Commission's agenda procedures, many local franchising authorities have agenda procedures that require minimum advance time to place items on the franchising authority's agenda.⁵ Accordingly, we propose that the initial review of the cable operator's basic tier rates be required to be completed within 90 days.⁶ Should the local franchise authority fail to take action within this period, the proposed base tier rates could go in effect.

20. Similarly, the local franchise authority would have great difficulty if not be faced with an impossible task of reviewing proposed increases and basic service rates within 30 days. Especially, if the local authority sought comments from interested parties. Thus, again we would suggest that a 90 day period be instituted. Accordingly, while a cable operator would be required to provide 30 days notice of proposed increases and basic service rates pursuant to Section 623(b)6, we would propose that the local franchise authorities would have the following alternatives and response to such a notice of proposed increases:

⁴ By statute, the City of Miami Beach would have to provide no less than ten (10) days advertised public notice for a public meeting for an ordinance, and under some circumstances thirty (30) days public notice is required.

⁵ The City of Miami Beach has a minimum of five (5) day rule for agenda items.

⁶ In many instances the local franchise authority will have substantial incentive to act expeditiously since it is reasonable to assume that initially rates will be lowered.

- A. Notify the cable operator within the thirty day period that such rate proposed increases are acceptable.⁷
- B. Notify the cable operator that such proposed increases require additional study and would then be subject to the 90 day rule. Any increase in basic service rates would be held in abeyance until the completion of such study.

21. Under no circumstances should the Commission permit rate increases to go in effect automatically after the 30 day notice period even if they would be subject to refunds if the local franchising authority ultimately determined the increase to be unjustified. This process would unduly burden cable consumers and unless coupled with a substantial penalty might encourage cable operators to propose unreasonable rate increases with the anticipation that they would be subsequently negotiated down, but in the interim the cable operator would get the benefit of the increased revenue flow.

22. With respect to the issue of due process in the rate making procedures, we agree that operators must be required not only to notify the franchising authorities, but also its customers of any proposed increase with at least 30 days prior notice. We believe that local franchise authorities should have the option of

⁷ We would not anticipate opposition to rate increases based upon tax increases, or other increased costs clearly beyond the control of the cable operator.

providing for formal hearings for proposed rate increases or in the local franchise authority's discretion, to provide for submission of written comments by any interested parties. Upon the conclusion of either procedure, we agree with the Commission that a local franchise authority should be required to issue a written decision explaining its disposition of each rate increase request.

23. With respect to enforcement of the rate regulation for basic cable service, we concur that the basic enforcement should be on a local level. We believe that Congress' mandate for local franchise authority's regulation of basic service rates would be meaningless without the enforcement authority to back up those rate decisions. Accordingly, we believe that the Act does provide sufficient authority for a local franchise authority to order refunds without obtaining an order from any other governmental authority. However, we do concur that prior to the issuance of any order for refunds the local franchise authority should provide basic due process rights to the cable operator such that either in a formal hearing or through written submission the cable operator be able to respond to specific alleged violations noted by the local franchising authority. Moreover, we believe that the ability to order a refund onto itself may be insufficient since the cable operator would have the use of those funds without further penalty. Thus, we believe that local franchise authorities should have the ability to impose fines for violations of its rate regulation and/or be able to require payment of interest computed based upon a statutory interest rate. Moreover, in the event of flagrant

disregard for the local franchise authorities' rate regulations and/or repeated willful non-compliance with the local franchise authorities' rate regulation and/or misrepresentation or lack of candor in the rate regulation process, the local franchise authority should be empowered to revoke or not renew the franchise agreements.

24. We believe the only logical forum for appeals from local authorities' rate decisions which are presumably based upon compliance in part with FCC rules and regulations and the Act would be the FCC. Local state courts simply lack the understanding and experience in these matters.⁸ However, any appeal of an FCC decision involving cable rates should be to the local Federal District Court, thus providing reasonable access for local franchise authorities who traditionally are not represented in Washington, D.C.

25. The Commission, in its notice, recognizes the likelihood that cable operators will likely retier its service offerings and will likely restructure their rates. Accordingly we agree with the Commission's tentative conclusion that the operator should give initial written notice of basic tier availability to its existing subscribers within 90 days or three billing cycles from the effective date of the Commission's rules and subsequently that cable operators be required to provide potential subscribers and

⁸ However, we do believe that the local cable operator and the local franchise authority should be afforded the opportunity if both parties agree to submit any disputes and/or appeals to alternative dispute resolution such as arbitration.

any and all sales information distributed prior to installation and hook-up at the time of installation information of the availability of the basic rate. However, the appropriate format and content of such notice should be a matter of agreement between the local franchise authority and the local cable operator and only in the event of dispute should the matter be brought to the FCC.

Regulation of Cable Programming Services

26. In footnote 127 the Commission solicits comments on the extent to which its regulations should produce lower rates for higher tiered services than those generally in effect at the time of enactment of the Act. We believe this to be of critical import. As noted in paragraph 3, above, since the enactment of the Act many cable operators around the country, including the cable operator serving Miami Beach, have chosen to increase rates. We believe those rate increases to be inappropriate in light of the Act and the FCC's mandated rule makings. Thus, we strenuously support the Commission's interpretation that it was Congress' intent to produce lower rates for all cable services including but not limited to higher tier services than those generally in effect at the time of the enactment of the Act. In this regard, we note in paragraph 105 that the Commission recognizes that complaints for unreasonable increases in cable programming services can be filed within 180 days after the effective date of its rules and that it has the ability to order roll backs. However, the Commission indicates that it does not believe that it is able to order refunds for any

unreasonable rates prior to the effective date of its regulations. Unfortunately, the Commission fails to note the source of its lack of authority for refunds. We believe that the Commission has not only the authority, but also the responsibility to order not only roll backs, but refunds for any unreasonable rates that were implemented after the enactment of the Act and prior to the effective date of its regulations. Any other interpretation would allow for cable operators to be unjustly enriched after being put on notice by the United States Congress that cable rates are unreasonably high and thus, required rate regulation.

27. With respect to the procedures for complaints to the Commission for cable programming service, we do not believe that Congress intended for interested parties to be required to file complaints with the local franchising authority and/or receive a decision by the local franchising authority as a condition precedent to filing complaints with the FCC for unreasonable rates for cable programming services. Moreover, we believe that the pleading standards for filing such complaints must be held to a minimum, i.e., that the individual is a subscriber to a particular cable channel and the basis for their opinion that any proposed increase is unreasonable. In addition, the complaint should be required to serve not only the cable operator but also on the local franchise authority. Both the local franchise authority as well as the cable operator should be given an opportunity to respond. The Commission, armed with not only the complaint but a substantive response by the cable operator and potential comments by the local

franchise authority, will likely have sufficient information and evidence to render a decision on such a complaint. In the unlikely event that it does not have sufficient information and/or evidence, it can solicit additional information from the parties.

28. The Commission notes that it is possible that it may be confronted with a request by cable operators regarding proprietary information and a request to withhold trade secrets and/or confidential financial or commercial information from routine disclosure to the public. While as a general matter we agree that cable operators need to be protected, we also observe that in most instances cable operators are a monopoly provider of cable service in the local franchise area. Thus, their need for protection is greatly reduced. We do not believe that full disclosure on a public record of such trade secrets or confidential financial information would be necessary. However, providing relevant financial information to complainants and local franchise authorities is critical in order to provide a meaningful complaint and enforcement process. Without proper cost information any rate regulation is meaningless.⁹ Thus, the Commission should not deny access to such information to parties to any given proceeding or complaint.

⁹ This information could be provided under a confidentiality agreement whereby the complainant and the local franchise authority would have access to the information without it being placed in the public record.

Ex Parte Restrictions

29. We take great exception to the Commission's consideration of treating cable programming service complaints as informal adjudications and thus, not restricted proceedings. While it is true that complaints may be filed by non-lawyers, it is also true that cable operators, in most circumstances, will be well represented in Washington with easy access to the FCC and its staff. This easy access will not be available to either complainants or local franchise authorities. Thus, the Commission must give maximum protection to local franchise authorities and customers complaining about cable programming services. If in fact the staff requires additional information it can do so in writing with service to all parties, thus, protecting the integrity of the Commission's processes. In the unlikely event that the Commission finds it necessary to establish a more formal proceeding to determine factual disputes or potential refund liability, these proceedings can be processed through written pleadings without the necessity of attendance of hearings in Washington. Under no circumstances should the Commission allow for ex parte contacts.¹⁰

Geographical Uniform Rate Structure

30. We believe that a cable operator should be restricted from discriminating among cable subscribers throughout its cable

¹⁰ Finally in this regard, we again believe that alternative dispute resolution and/or arbitration is an alternative that should be available, if agreed to by both parties.

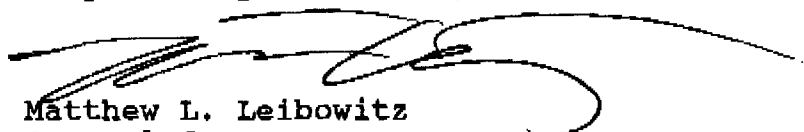
system whether or not that is greater than any given franchise area (i.e., the system serves two contiguous local franchise areas). Moreover, we believe that the statutory discrimination prohibition should be applied to eliminate special offering which would disadvantage one cable consumer over another. For instance, in Florida a cable operator may provide discounts to a given community within its local franchise area if more than a certain percentage of the community signs up for cable service. This marketing device would allow a cable subscriber within that community to receive identical service to a cable subscriber outside that area, but at a lower cost. We would oppose any such differential offerings other than those statutorily provided for which includes senior citizens, economically disadvantaged quotes and the hearing impaired.

Negative Option Billing

31. We believe that the Commission's notice and tentative conclusions with respect to negative option billing are contrary to the Congressional intent to ban negative option billing. While the Commission is concerned that requiring affirmative responses to changes of service or rates may inhibit cable operators upgrade in systems and equipment, the clear intent of Congress was to protect the consumer from any negative options. Thus, we believe that any decrease in service or increase in rates must be subject to prior affirmative consent by the cable subscriber either orally or in writing. Thus, the cable operator should be required to notify its subscribers at least 30 days in advance of any change

in the system's offerings which would decrease cable offerings in a given tier or a requirement of additional equipment, or an increase in cost and the cable operator should be prohibited, in the absence of an affirmative acceptance of these new offerings, from receiving any additional revenues.

Respectfully Submitted,



Matthew L. Leibowitz
Counsel for
The City of Miami Beach, Florida

January 27, 1993

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OFFICE OF THE CITY MANAGER

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December 14, 1992

Mr. Kevin D. Grossman
General Manager
Gold Coast Cable Vision
1440 79th Street Causeway, Suite 201
North Bay Village, FL 33141

Re: Proposed Increase in Cable TV Rates

I am in receipt of your letter of November 16, 1992, wherein you advise that you are planning to raise cable TV rates in Miami Beach. I have separately received a notice from your company to your subscribers dated November 15, 1992, provided to me by a homeowner, which says that the new rates are effective December 15, 1992.

The City of Miami Beach objects to and protests this proposed rate increase for the following reasons:

- 1) The 1992 Cable TV Act was enacted on October 5, 1992 and provides that the Federal Communications Commission (the "FCC") shall issue rate regulations within 180 days of enactment.
- 2) On December 10, 1992, the FCC proposed rate regulations for regulation of basic tier service, cable programming services, equipment offered to subscribers and other matters. The regulations must be adopted by the FCC by April 5, 1993.
- 3) Your proposed rate increases, coming as they do while the FCC is in the process of adopting regulations, appears to be an effort on your part to preempt or evade the new regulations.
- 4) Since one of the factors which the FCC must consider in establishing rate regulation is "the rates for similarly situated systems", you, as well as other cable providers, appear to be trying to raise the threshold of similarly situated systems so that future increases can work from this inflated and undocumented threshold.

Kevin D. Grossman

Page 2

December 14, 1992

- 5) Although your newly prepared rates are alleged by your letter and notice to be based upon increased costs to your company, no backup information was provided to the City of such increased costs.
- 6) The 1992 Act provides that under any franchise in force prior to July 1, 1990 which provided for regulation of basic cable service rates, the franchising authority shall have the right to regulate rates under such an agreement. Both City of Miami Beach franchises under the control of Gold Coast were entered into prior to July 1, 1990, and accordingly, the rate regulation procedures set forth in the franchises must be adhered to.

We do not consider your actions of proposing a rate increase while the FCC has the regulations under advisement to be a fair and good faith effort to cooperate with the FCC and the City in their implementation of the 1992 Cable Act. We believe that a more fair position would be for you to hold back on the increase and comment on the proposed rate regulations.

We would hope that the FCC will either adopt an emergency rule to set aside rate increases made prior to April 5, 1993, or vigorously pursue reduction of any rate increases implemented during the period from enactment of the Act to April 5, 1993.

Sincerely yours,



Roger M. Carlton
City Manager

PNB:lm

cc: Mayor Seymour Gelber and City Commissioners
Cathy Grimes, Dade County Cable TV Coordinator
Federal Communications Commission